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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 568

ORLIE C. UTTECH, SHERIFF, DODGE COUNTY, WISCONSIN,
Petitioner,

vs.

STATE OF WISCONSIN, EX REL., ISAAC FOSTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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INDEX

	Page
Opinions	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of Case	3
Argument	4
I. The Decision of the Supreme Court of Wisconsin is contrary to the requirements of the Constitution, the federal statute, and the decisions of this Court	4
A. Courts of the asylum state, in an extradition proceeding, may not inquire into the procedure of the demanding state prior to issuance of the requisition to determine whether probable cause existed for issuance of the arrest warrant	4
B. Assuming arguendo a constitutional requirement of a finding of probable cause to issue an arrest warrant in extradition proceedings, there was probable cause in the case at bar	8
II. The decisions of the highest courts of the States are in conflict concerning an important rule of constitutional law requiring uniformity among the States	8
Conclusion	10
Appendix	1a

Citations and Authority

Case	*Page*
Appleyard v. *Massachusetts*, 203 U.S. 222 (1906)	6
Biddinger v. *Commissioner of Police*, 245 U.S. 128 (1917)	5, 9
Dawson v. *Beasley*, 242 Ind. 536, 180 N.E.2d 367 (1962)	9
Draper v. *United States*, 358 U.S. 307 (1959)	8
Drew v. *Thaw*, 235 U.S. 432 (1914)	5
Jaben v. *United States*, 381 U.S. 214 (1965)	6, 8
Johnson v. *Burke*, 238 Ind. 1, 148 N.E.2d 413 (1958)	8
Kentucky v. *Dennison*, 24 How. 66 (1860)	5
Marbles v. *Creecy*, 215 U.S. 63 (1909)	5
Munsey v. *Clough*, 196 U.S. 364 (1905)	5
Pettibone v. *Nichols*, 203 U.S. 192 (1906)	5
South Carolina v. *Bailey*, 289 U.S. 412 (1933)	5, 8
Stanley v. *Beasley*, 243 Ind. 384, 185 N.E.2d 731 (1962)	9
Turner v. *O'Neal*, 237 Ind. 258, 145 N.E.2d 1 (1957)	8

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VS.

STATE OF WISCONSIN, EX REL., ISAAC FOSTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above case on July 1, 1966.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported at 143 N.W.2d 500, and is as yet unreported in the official Wisconsin Reports. Such opinion is appended hereto. (App., p. 1a.)

JURISDICTION

The judgment of the Supreme Court of Wisconsin was made and entered on July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the courts of the asylum state, in an extradition proceeding, may permit collateral attack upon the affidavit, warrant, and procedures of the demanding state prior to issuance of the requisition to determine whether probable cause existed to issue the initial arrest warrant in the demanding state under Art. 4, § 2, cl. 2, of the Constitution of the United States, providing that "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime," and its implementing statute 18 U.S.C. § 1382.

2. Whether the court below erred in denying extradition and discharging the respondent where the requisition papers from Indiana were duly authenticated with an affidavit sworn to before a magistrate by the police officer who investigated the crime and interviewed the victims who identified the respondent, charging the respondent with robbery; and respondent was identified and established as a fugitive under Art. 4, § 2, cl. 2, Constitution of the United States and 18 U.S.C. § 3182.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 4, § 2, cl. 2, and Fourth Amendment of the Constitution of the United States; 18 U.S.C. § 3182; Burns IND. STAT. ANN. §§ 9-418, 9-421, 9-438, 9-441; Wis. Stat. Ann. §§ 964.03 and 964.10 are set forth in the Appendix hereto at App. pp. 1a to 17a.

STATEMENT OF CASE

Relator, Isaac Foster, was charged in Indianapolis, Indiana, with a robbery which occurred on December 7, 1962, in the City of Indianapolis, Marion County, Indiana. (R. 36, 40-41.)

James V. Dabner, an Indianapolis policeman, investigated the robbery and interviewed the victims. Thereafter, on September 23, 1964, Dabner swore to an affidavit before one John Hesseldenz, Justice of the Peace in Marion County, which charged Foster with the crime. (R. 41-42.) Dabner thereafter presented the affidavit to the deputy clerk of the Criminal Court for Marion County who signed and filed an arrest warrant for Foster. (R. 43.) The proceedings on issuance of the arrest warrant were held before Saul I. Rabb, presiding judge of the Criminal Court of Marion County. The exact nature of Judge Rabb's participation in the proceedings is unclear. (R. 11-12.)

The Governor of Indiana thereafter made a demand for requisition, which included copies of the affidavit and warrant, upon the Governor of Wisconsin. The Governor of Wisconsin issued his warrant for Foster's arrest in compliance with the demand. (R. 7.)

Foster obtained a Writ of Habeas Corpus from the county court for Dodge County, Wisconsin, and a hearing had on December 15, 1964. On December 15, 1964, the county court quashed the writ of habeas corpus. The Supreme Court of Wisconsin thereafter reversed the trial court and ordered Foster discharged.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF WISCONSIN IS CONTRARY TO THE REQUIREMENTS OF THE CONSTITUTION, THE FEDERAL STATUTE, AND THE DECISIONS OF THIS COURT

The Supreme Court of Wisconsin in its opinion, in the case at bar, so disregarded the Constitution and the federal extradition statute, 18 U.S.C. § 3182 and misapplied the decisions of this Court to afford ample reason under Supreme Court Rule 19, for this Court to grant writ of certiorari to review the decision.

A.

Courts of the asylum state, in an extradition proceeding, may not inquire into the procedure of the demanding state prior to issuance of the requisition to determine whether probable cause existed for issuance of the arrest warrant.

The court below erroneously permitted collateral attack on the affidavit and arrest warrant and determined that the warrant was not based upon probable cause. The court's decision is, therefore, contrary to Art. 4, § 2, cl. 2 of the Constitution of the United States and its implementing statute, 18 U.S.C. § 3182.

Article 4, § 2, cl. 2, requires that the state where a fugitive felon is found, deliver him to the State wherein charged, upon demand: The federal implementing statute of that constitutional provision requires that the demanding state's requisition contain a copy of the affidavit made

before a magistrate and show that a crime is charged and the person is a fugitive. The requirements of both the constitutional provision and its implementing federal statute were met by Indiana. The court below ignored both in adding the requirement of probable cause for issuance of the arrest warrant.

It is well settled by this Court that the State on whom the demand is made may not go behind the requisition papers, for such would defeat the purpose and provisions of the Constitution. *Drew v. Thaw,* 235 U.S. 432 (1914); *Munsey v. Clough,* 196 U.S. 364 (1905).

The guilt or innocence of the accused is not open to question on extradition. *South Carolina v. Bailey,* 289 U.S. 412 (1933). The pleading and process in the demanding state is not open to question. *Kentucky v. Dennison,* 24 How. 66 (1860).

This Court also held that questions involving constitutional and civil rights arising in the demanding state are not proper subjects of inquiry in an extradition proceeding. *Marbles v. Creecy,* 215 U.S. 63 (1909); *Pettibone v. Nichols,* 203 U.S. 192 (1906). In essence, this court has held it improper to inquire into the merits of a case on extradition. As Justice Holmes pointed out in *Drew v. Thaw, supra,* the purpose of an extradition proceeding is not to substitute the judgment of one court for that of another.

This Court in discussing the constitutional provision in *Biddinger v. Commissioner of Police,* 245 U.S. 128 (1917), said:

> ". . . The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated

> States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another. . . . Its design was and is, in effect, to eliminate, for this purpose, the boundaries of States, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land." 245 U.S. 132, 133.

This very purpose was defeated by the court below in going behind the requisition papers and essentially providing a preliminary hearing. Its reliance upon *Jabën v. United States,* 381 U.S. 214 (1965) is a complete misapplication of that case. *Jaben* is without any application to the case at bar. It is not an extradition case, but a federal criminal tax evasion case revolving around the Federal Rules of Criminal Procedure. Further, if it were applicable, it would not be binding because it lacks a majority opinion.

Review by this Court would not bring in to question the validity of either the Indiana or Wisconsin extradition statutes implementing the federal constitutional provision, for neither requires a finding of probable cause. Burns IND. STAT. ANN. §§ 9-418, 9-421, 9-438, 9-441; Wis. Stat. Ann. §§ 964.03, 964.10. The court below misconstrued its own statutes.

This Court specifically set forth the requirements of the Constitution, in an extradition proceeding, in *Appleyard v. Massachusetts,* 203 U.S. 222 (1906), when it said,

> ". . . A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the

time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States. And while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State." 203 U.S. 227, 228.

The Supreme Court of Wisconsin ignored these commands of the supreme law of the land in the case at bar. A duly certified and authenticated copy of the affidavit was produced in the case at bar along with sufficient evidence that the accused was a fugitive. The accused is obviously charged with a crime. On this basis, the court below was charged with a clear and unmistakable duty to deny the writ of habeas corpus under the Constitution.

B.

Assuming arguendo a constitutional requirement of a finding of probable cause to issue an arrest warrant in extradition proceedings, there was probable cause in the case at bar.

Officer Dabner appeared before a justice of the peace to sign the affidavit which was based upon his investigation of the robbery and interviews with eye witnesses. This was sufficient showing to lead a reasonably prudent magistrate to believe that a felony had been committed by Foster. *Jaben v. United States,* 381 U.S. 214 (1965); *Draper v. United States,* 358 U.S. 307 (1959).

II.

THE DECISIONS OF THE HIGHEST COURTS OF THE STATES ARE IN CONFLICT CONCERNING AN IMPORTANT RULE OF CONSTITUTIONAL LAW REQUIRING UNIFORMITY AMONG THE STATES

The decision of the Supreme Court of Wisconsin, in the case at bar, is in direct conflict with decisions of the Supreme Court of Indiana.

The Indiana court has held that in a habeas corpus proceeding involving extradition, courts of the asylum state can not go behind the proceedings in the demanding state. *Johnson v. Burke,* 238 Ind. 1, 148 N.E.2d 413 (1958). The court in *Turner v. O'Neal,* 237 Ind. 258, 145 N.E.2d 1 (1957), in reliance on *South Carolina v. Bailey,* 289 U.S. 412 (1933), said:

> "In habeas corpus proceedings for the release of one held under a rendition warrant as a fugitive

> from justice of another State, the court in Indiana cannot consider the alleged insufficiency of any charge made by the demanding State, nor the guilt or innocence of the alleged fugitive." 237 Ind. 262.

In *Dawson v. Beasley*, 242 Ind. 536, 180 N.E.2d 367 (1962), the court held that the fact that the complaint was supported by an affidavit sworn to before a magistrate was sufficient. Likewise, the court in *Stanley v. Beasley*, 243 Ind. 384, 185 N.E.2d 731 (1962), said:

> ". . . all matters of defense that may be presented in the demanding state may not be made an issue and litigated in the state from which the petitioner is being extradited." 243 Ind. 385.

The decision of these two courts is in conflict over interpretation of Art. 4, § 2, cl. 2, of the Constitution, 18 U.S.C. § 3182, and virtually identical state statutes, Wis. Stat. Ann. §§ 964.03 and 964.10 and Burns IND. STAT. ANN. §§ 9-418, 9-421, 9-438, and 9-441.

This Court has consistently pointed out the importance of uniformity in extraditing those accused of crimes from state to state. *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917). The Constitution demands uniformity in extradition among the states. The decision of the court below is not only contrary to the Constitution, but strikes a blow against the uniform extradition of fugitive felons. This constitutes ample reason under Rule 19(2) of this Court, to grant a writ of certiorari to review the decision of the court below.

CONCLUSION

The decision of the Supreme Court of Wisconsin is in direct contravention of the Constitution and a federal statute. It is alsc in direct conflict with the decisions of the highest court of a sister state in an area of the law demanding uniformity among the States. These afford sufficient reason under Rule 19 of this Court to grant a writ of certiorari.

WHEREFORE, for the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF WISCONSIN ENTERED JULY 1, 1966

AUGUST TERM, 1965

STATE OF WISCONSIN : IN SUPREME COURT

No. 118

State ex rel., ISAAC FOSTER,

Appellant,

vs.

ORLIE C. UTTECH, Sheriff,
Dodge County, Wisconsin,

Respondent.

APPEAL from an order of the county court of Dodge county: CLARENCE G. TRAEGER, Judge. *Reversed, with directions.*

This is an extradition case and involves an appeal from an order quashing a writ of *habeas corpus.*

While the appellant Isaac Foster was an inmate in the Wisconsin state prison at Waupun, the state of Indiana on February 25, 1963, filed a detainer charging him with the crime of robbery on December 7, 1962, in Marion county, Indiana. No action to bring Foster to trial was taken by

Indiana although several requests were made by Foster. On September 23, 1964, a few weeks before Foster's conditional release from the state prison, the state of Indiana commenced an extradition proceeding. An affidavit on that day was sworn to by a police officer before a justice of the peace in Marion county. A deputy clerk of the criminal court of that county issued an arrest warrant and upon these documents the governor of Indiana executed his requisition certifying that Isaac Foster stood charged by an affidavit pending in Marion county with the crime of robbery committed in Indiana and had fled from the justice of that state. These documents were presented to the governor of the state of Wisconsin who issued his extradition warrant on October 8, 1964.

However, two days prior thereto upon Foster's conditional release from prison he was turned over to the agent of Indiana upon a fugitive warrant issued by the county court of Dodge county upon application of the agent of Indiana under sec. 964.13. Foster was brought before the county court for Dodge county but the record is not clear whether this was done as required by sec. 964.15 upon the fugitive warrant or upon the governor's warrant which had then been issued and upon which a hearing is required by sec. 964.10, Stats. It is apparent, however, from the record that at the hearing Foster informed the court of his desire to test the legality of his arrest, a request he had a right to make under sec. 964.10. The judge adjourned the matter and admitted Foster to bail. A writ of *habeas corpus* was issued on November 10, 1964, and hearing had thereon on December 15, 1964.

The petition for the writ alleged three grounds for relief: (1) Identity, (2) denial of a speedy trial, and (3) governor's warrant illegally and improperly issued. After a

hearing at which evidence was taken, the trial court considered the matter of the legality of the arrest was one to be determined by the courts of Indiana and since the defendant had been identified to his satisfaction as the person alleged in the governor's warrant as being charged with the crime of robbery in Indiana, the court quashed the writ of *habeas corpus*, and this appeal followed.

HALLOWS, J. The issue presented is whether Foster is legally detained upon the governor's warrant which enjoys a *prima facie* presumption of legality. More precisely stated, can this court in testing the legality of the arrest in a *habeas corpus* proceeding go behind the governor's rendition warrant and examine the affidavit and warrant and other documents issued in Indiana to determine whether they meet the constitutional requirements for arrest for extradition purposes and the statutes of Wisconsin for such purpose?

The constitution of the United States in Article IV, Section 2, provides, "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This constitutional requirement was implemented by federal legislation to provide for the procedure in demanding extradition. 18 USCA, sec. 3182. This section provides that whenever the executive authority of a state demands a person as a fugitive from justice and produces a copy of an indictment founded on an affidavit made before a magistrate charging the person demanded with having committed the crime certified as authentic, the executive authority of the state to which the person has

fled will cause him to be arrested and to be delivered to the agent of the demanding state.

Many states, however, including Wisconsin and Indiana, have enacted the Uniform Criminal Extradition Act as legislation ancillary to and in aid of the federal constitution and statute. In sec. 964.02 of this act, the duty of the governor of this state to deliver up a fugitive from justice to the demanding state is made subject to the qualifications of the chapter, the provisions of the constitution of the United States, and the acts of congress. In sec. 964.03, Stats., it is provided that no demand for extradition shall be recognized unless it is in writing showing the accused was present in a demanding state at the time of the alleged crime and that he fled from that state, and accompanied by a copy of either the indictment founded on, or of an information supported by, an affidavit or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon.[1] The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state and be authenticated by the executive authority making the demand.

The act further provides the governor may investigate the case, sec. 964.04, Stats., and if he decides the demand should be complied with shall sign his warrant of arrest which warrant must substantially recite the facts necessary to the validity of its issuance, sec. 964.07, Stats. However, no person arrested upon the governor's warrant may be delivered to the agent of the demanding state unless he is first taken forthwith before a judge of a court of record in

[1] The copy of the warrant is not required by the federal statute, 18 USCA, sec. 3182.

this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has a right to demand and procure legal counsel and if the prisoner or his counsel shall state he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time within which to allow him to apply for a writ of *habeas corpus*. Sec. 964.10, Stats.

It is clear that evidence which goes to the guilt or innocence of the accused may not be inquired into, either by the governor or any proceeding after the demand for extradition if a charge of a crime in legal form has been presented to the governor except as such issue is indirectly involved in the identification of the person held as the one charged with the crime, sec. 964.20, Stats. While evidence in the trial court was taken in this case as to what probable cause the police officer had for swearing to the affidavit on which the warrant was issued, we do not think this type of evidence goes to guilty or innocence because that issue is not decided. Such evidence goes to the validity of the warrant. In *Kojis v. Barczak* (1953), 264 Wis. 136, 58 N.W. (2d) 420, and in *State ex rel. Krueger v. Michalski* (1957), 1 Wis. (2d) 644, 85 N.W. (2d) 339, this court probably took a limited and narrow view of what evidence may be admitted to go behind the governor's warrant, but we do not in this case reach the scope of the evidence because the Indiana documents on their face are insufficient to sustain the rendition warrant of the governor.

We think this court in a *habeas corpus* proceeding may examine into constitutional questions affecting the legality of the arrest in this state for extradition at least where constitutional standards are shown not to have been complied with on the face of the documents. If this court was

restricted solely to the questions of identity, of fugitive status, and of whether an extraditable crime is charged, there would be very little purpose in providing a statutory right to a *habeas corpus* "to test the legality of his arrest." The legality of arrest on the governor's warrant at most is only *prima facie* valid. *Ex parte Cohen* (1953), 23 N. J. Super. 209, 92 Atl. (2d) 837, aff. 12 N. J. 362, 96 Atl. (2d) 794. Not to examine the sufficiency of the foundation documents on direct attack as in a *habeas corpus* proceeding would make the presumption conclusive. Nor is there any purpose in requiring copies of the information or affidavit and warrant if they are not to be examined to see if the demand or requisition is proper and can serve as a valid basis for a governor's rendition warrant.

In a recent case of *State v. Limberg* (1966), — Minn. —, 142 N.W. (2d) 563, the Minnesota court under a section similar to sec. 964.03 examined the underlying affidavit and warrant of the state of Michigan. In discussing the additional point involving whether the accused was in Michigan at the time of the extradition, the court asked, "Is the presumptive effect of the rendition warrant when supported by affidavits accompanying the demand for extradition sufficient in itself to repeal the positive testimony of the appellant that he was not present in the demanding state?" The court held it was not and it was incumbent upon the demanding state to present some testimony to contradict the positive declaration. In *Kojis* this court examined the copy of the affidavit and warrant upon which the requisition was made and which furnished the basis for the governor's warrant in order to determine whether they complied with sec. 964.03, Stats., in substantially charging the person with having committed a crime in North Carolina and this in view of the certification by

the governor of North Carolina that the affidavit and warrant charged a crime. In *State ex rel. Wells v. Hanley* (1947), 250 Wis. 374, 27 N.W. (2d) 373, this court, while it refused to inquire on *habeas corpus* into the legality of an Alabama imprisonment because that issue on *habeas corpus* was not before it, stated the purpose of *habeas corpus* was to inquire into the detention under the fugitive warrant issued in this state. See *State ex rel. Keehn v. Capelle* (1962), 17 Wis. (2d) 116, 115 N.W. (2d) 487; also *State v. Klein* (1964), 25 Wis. (2d) 394, 130 N.W. (2d) 816, cert. denied 380 U. S. 951.

In *State ex rel. White v. Simpson* (1965), 28 Wis. (2d) 590, 137 N.W. (2d) 391, we determined the constitutional guaranties as interpreted by the United States supreme court required warrants of arrests to be issued by independent magistrates and upon a showing of probable cause. We stated:

> "As a result of the United States supreme court cases, it is constitutionally essential that the magistrate be mindful of the underlying circumstances before he authorizes the issuance of a warrant. The magistrate may not accept without question the suspicions or conclusions of a complainant but, on the contrary, must determine the existence of probable cause after being apprised of the relevant facts. In performing this function, the magistrate or court commissioner serves as a judicial officer and must act in a neutral and detached manner. He must receive an adequate answer to this hypothetical question: 'What makes you think that the defendant committed the offense charged?' *Jaben v. United States* (1965), 381 U.S. 214, 224, 85 Sup. Ct. 1365, 14 L. Ed. (2d) 345."

The Indiana proceedings do not meet this standard. The record consists of: An affidavit by James V. Dabner sub-

scribed to before a justice of the peace of Marion county in which Dabner swore on oath that Isaac Foster on the 7th day of December, 1962, in Marion county, Indiana robbed Gabe Cohen and Richard Riding of $2,000; a warrant of arrest for Isaac Foster to answer the affidavit for robbery signed by Edwin McClure, the clerk of the criminal court of Marion county by a Constance Schulmeyer;[2] a certification that these two documents constituted the proceedings had on September 23, 1964, before Honorable Saul I. Rabb, judge of the criminal court of Marion county signed by clerk Edwin McClure; a certificate by Saul I. Rabb, the presiding judge, that the attestation and certificate of McClure are in due form of law and McClure was the clerk; and a certification of McClure that Saul I. Rabb was the presiding judge of the court. These documents were accompanied by a request of the prosecuting attorney to the governor of Indiana for his requisition to have Foster extradited. Upon these documents the governor of Indiana issued his requisition to the governor of Wisconsin. Nowhere in these documents does it appear the issuance of the warrant was by a magistrate or on a probable cause. True, the affidavit charges a crime but it does not meet the constitutional requirements of *White v. Simpson, supra.* So far as the record shows, the deputy clerk accepted this insufficient affidavit without a determination of probable cause and issued the warrant. The duty of the governor of this state to have an alleged fugitive arrested and delivered up is subject to the provisions of the constitution of the United States. Sec. 964.02, Stats.

Under sec. 328.01, Stats., this court is required to take judicial notice of the statutes of sister states. We note that

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[2] We note in Assembly Bill 1104 introduced in the legislature last month that sec. 954.02, Stats., is amended to require the complaint to be made before a magistrate who shall sign the warrant of arrest.

Indiana has a Uniform Criminal Extradition Act and besides has a special act pertaining to warrants of arrest of fugitives from Indiana. See 4 Burns, Indiana Statutes Anno. (part 1), p. 18, sec. 9-418 [2071]. This section requires the warrant for the arrest of a fugitive shall be issued by the judge of the circuit, superior, criminal or city court or the justice of the peace before whom the affidavit is filed. The present record shows the affidavit was made before a justice of the peace and a warrant issued, not by the justice of the peace but by a deputy clerk. The Indiana statute applicable to general warrants of arrest, which is sec. 9-1001, provides:

> "*Issuance of warrant or summons.*—(a) When an indictment is found or an affidavit filed against a person charging him with the commission of an offense, the court or a judge thereof shall, subject to the provisions of subsection (b) [of] this act, direct the clerk to issue immediately a warrant of arrest returnable forthwith. If no order is made, the clerk shall issue warrants upon all indictments and affidavits within ten [10] days after the filing of such indictments and affidavits."

There is no order in the record of the judge directing the clerk to issue the warrant immediately nor is there any record of any proceeding before the judge, much less that probable cause was determined. Our sec. 964.03 seems to require the warrant to be issued by the magistrate before whom the affidavit is made. In *Ex parte Rubeys* (1951), 73 Ariz. 101, 238 Pac. (2d) 402, cert. denied 344 U.S. 840, 73 Sup. Ct. 50, 97 L. Ed. 653, the court interpreted the federal act, 18 USCA, sec. 3182, to require the making of the affidavit before the magistrate who issues the warrant.

We think on this record that the Indiana documents are defective and insufficient to sustain the Wisconsin gover-

nor's warrant. In Huttaway v. Culbreath (1952) (Fla.), 57 So. (2d) 661, it was held that documents from Alabama for extradition did not comply with sec. 941.03 of the Florida statutes, which is similar to our sec. 964.03, and were insufficient to support a governor's rendition warrant and therefore the issuance of the warrant was illegal and void. In *Ex parte Harch* (1955), 160 Texas Crim. Rep. 602, 274 S. W. (2d) 74, it was held the Arizona documents for extradition did not meet the Texas Uniform Criminal Extradition Act, sec. 3, article 1008A, which is substantially the same as our sec. 964.03, and that fact was sufficient to overcome the presumption of the legality and sufficiency of the rendition warrant of the governor.

In some of the older cases the attitude has prevailed in extradition cases that the defects in the demand are questions to be raised in the demanding state after the accused is returned. We think there is no justice in saying to a person in Wisconsin subject to our laws and entitled to the protection of his rights, that he may be extradited but may contest the legality of his extradition *ex post facto*. Nor is it just to put the accused to the expense, inconvenience and jeopardy involved in a defense in the demanding state when this preliminary prerequisite to extradition can be determined here. Perhaps we went too far in characterizing the extradition process as satisfying the purposes of a preliminary hearing as we did in *Johns v. State* (1961), 14 Wis. (2d) 119, 109 N.W. (2d) 490. And, while a fugitive is not entitled to asylum in the international sense, he is entitled to lawful arrest.

It should also be pointed out the governor's warrant refers as its basis only to the affidavit made before the magistrate and also requires the delivery to the agent of Indiana after only giving Foster a reasonable time to advise with friends and counsel. This form of warrant

does not comply with sec. 964.07, Stats., and is in conflict with secs. 964.03 and 964.10, Stats. Our opinion, however, is not based upon such imperfections.

We hold then the trial court was in error in not examining into the legality of Foster's detention under the governor's warrant and since the Indiana requisition documents do not meet the requirements of sec. 964.03, Stats., or of constitutional standards, the rendition warrant was unlawfully issued and Foster is entitled to his discharge.

By the Court.—The order appealed from is reversed, with direction to discharge Foster from the custody of the sheriff of Dodge County.

GORDON, J. (Dissenting) I must respectfully dissent. This court is not in a fair position to explore the debatable facts involved in the alleged unconstitutionality of the Indiana warrant of arrest. There is indeed doubt whether the Indiana proceedings were proper, but such doubt should be resolved in the Indiana courts, not in the Wisconsin supreme court. Their proceedings are *prima facie* valid, and since the claimed defect is not entirely clear from the face of the documents, we should not purport to resolve this question. *State ex rel. Krueger v. Michalski* (1957), 1 Wis. (2d) 644, 85 N.W. (2d) 339; *Kojis v. Barczak* (1953), 264 Wis. 136, 58 N.W. (2d) 420.

As tardy conformists to the requirements of the United States constitution recognized by us in *State ex rel. White v. Simpson* (1965), 28 Wis. (2d) 590, 137 N.W. (2d) 391, we should be particularly reluctant to assume that a sister state still fails to recognize the light which we so recently observed.

I am authorized to state that Mr. Chief Justice Currie joins in this dissent.

JUDGMENT OF THE SUPREME COURT OF WISCONSIN ENTERED JULY 1, 1966

(Omitting caption and signature.)

"This cause came on to be heard on appeal from the order of the County Court of Dodge County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the order of the County Court for Dodge County, in this cause, be, and the same is hereby, reversed, with direction to discharge Foster from the custody of the sheriff of Dodge County.

"Justice Gordon and Chief Justice Currie dissent." (Tr. p. 118.)

ARTICLE 4, § 2, cl. 2, CONSTITUTION OF THE UNITED STATES:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C. § 3182:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, Dis-

trict or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

BURNS IND. STAT. ANN. § 9-418:

"When any person has committed a crime in any county in the state of Indiana, which is punishable by imprisonment in the state's prison, and has fled to any other county, state, territory, or country, and the governor has issued a requisition for such person or a grand jury indictment or affidavit charging said person with said crime has been filed, the judge of the circuit, superior, criminal or city court, or the justice of the peace before whom the said indictment or affidavit is filed, shall issue a warrant for the arrest of said criminal, and designate an agent in said warrant to make the arrest and return the criminal to the court, upon the request of the prosecuting attorney or his deputy for the county in which the crime was committed. The agent shall return the criminal by the shortest possible route and shall receive the following mileage. Eight cents [8c] for each mile of the first two hundred [200] miles traveled; seven cents [7c] for each mile of the next three hundred [300] miles traveled, six cents [6c] for each mile of the next five hundred [500]

miles and over traveled, and five cents [5c] per mile for each mile traveled by the prisoner while in the custody of the agent. The said agent shall be reimbursed for all money legally expended to obtain possession of said criminal, upon presentation of receipts covering the same, together with a sworn statement by him that such items of expenditure are true and correct. Such sum shall be paid out of the county treasury of the county in which the said crime was committed, upon certificate of the judge or justice of the peace before whom said indictment or affidavit is on file, stating that the said criminal has been brought before him and arraigned, and on the verified statement of said agent, certified to by the said judge or justice of the peace, filed with the auditor of the said county, who shall draw his warrant therefor. And the county council shall make such appropriation as shall be necessary to carry out the provisions of this act: Provided, That if any such agent shall, without fault of such agent, be unable to apprehend and produce such fugitive from justice, such agent shall, notwithstanding, be entitled to receive the mileage, other than the mileage of the prisoner, as hereinbefore provided, and, in addition thereto, shall be reimbursed for all money legally expended in his attempts to obtain possession of such fugitive."

BURNS IND. STAT. ANN. § 9-421:

"No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information, or affidavit made before the magistrate must substantially charge the

person demanded with having committed a crime under the law of that state; and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth."

BURNS IND. STAT. ANN. § 9-438:

"The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime."

BURNS IND. STAT. ANN. § 9-441:

"When the return to this state of a person charged with crime in this state is required, the prosecuting attorney of the county in which the offense is committed shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the approximate time, place and circumstances of its committal, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two [2] certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting attorney may

also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One [1] copy of the application with the action of the governor indicated by indorsement thereon, and one [1] of the certified copies of the indictment or complaint or information and affidavit, shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition."

WIS. STAT. ANN. § 964.03:

"No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging, except in cases arising under s. 964.06, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand."

WIS. STAT. ANN. § 964.10:

"No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a write of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state."

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No. 568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ORLIE C. UTTECH, SHERIFF, DODGE COUNTY, WISCONSIN,
Petitioner,

vs.

STATE OF WISCONSIN ex rel. ISAAC FOSTER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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INDEX

PAGE

Opinion Below 1

Question Presented 2

Statement of Case 3

Summary of Argument 5

Argument 7

I. The decision of the Wisconsin Supreme Court is neither in conflict with the decisions of this court nor the decisions of the highest courts of the states 7

A. The procedure followed by the Wisconsin Supreme Court has been sanctioned by this court 9

B. The procedure followed by the Wisconsin Supreme Court is consistent with the practice in the highest courts of the states, including the Indiana Supreme Court 11

II. The federal question involved in the case at bar has long been settled by this court 12

Conclusion 15

AUTHORITIES CITED

Cases

	PAGE
Appleyard v. Massachusetts, 203 U.S. 222, 228 (1906)	9
Aguilar v. Texas, 378 U.S. 108 (1964)	14
Biddinger v. Commissioner of Police, 245 U.S. 128 (1917)	9
Dawson v. Beasley, 242 Ind. 536, 180 N.E. 2d 367 (1962)	11
Drew v. Thaw, 235 U.S. 432 (1914)	9
Ex Parte Harck, 274 S.W. 2d 74 (Tex. Crim. App. 1965)	12
Ex Parte Rubens, 73 Ariz. 11, 238 P. 2d 402 (1952)	11
Giordenello v. United States, 357 U.S. 480 (1958)	14
Hattaway v. Culbreath, 57 So. 2d 611 (Fla. 1952)	12
Jaben v. United States, 381 U.S. 214, 224 (1965)	13, 14
Johnson v. Burke, 228 Ind. 1, 148 N.E.2d 413 (1958)	11
Johnson v. United States, 333 U.S. 10 (1948)	14
Ker v. California, 374 U.S. 23 (1963)	12
Mapp v. Ohio, 367 U.S. 643 (1961)	12
Munsey v. Clough, 196 U.S. 364 (1905)	9
Nathanson v. United States, 290 U.S. 41 (1930)	14
People ex rel. Rukavina v. Sain, 22 Ill. 2d 546, 177 N.E. 2d 110 (1961)	12
Pettibone v. Nichols, 203 U.S. 192 (1906)	9

PAGE

South Carolina v. Bailey, 289 U.S. 412 (1933) 9

Stanley v. Beasley, 243 Ind. 384, 185 N.E. 2d 731 (1962) 11

State ex rel. Foster v. Uttech, 31 Wis. 2d 664, 671, 143 N.W. 2d 500, 503, 504 (1966) 7, 8

State ex rel. White v. Simpson, 28 Wis. 2d 590, 137 N.W. 2d 391 (1965) 12, 13

Turner v. O'Neal, 237 Ind. 258, 145 N.E. 2d 1 (1957) .. 11

United States v. Ventresca, 380 U.S. 120 (1965) 14

Miscellaneous

18 U. S. C. §3182 13

Wis. Stats. §§ 964.03, 964.10 12-13

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OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported at 31 Wis. 2d 664, 143 N.W. 2d 500 (1966).

QUESTION PRESENTED

Whether in an extradition case the courts of the asylum state (Wisconsin) may review the documents, supplied by the demanding state (Indiana) and made the basis for the issuance of a Governor's Warrant in the asylum state, to determine whether those documents on their face conform to the requirements of the Fourth and Fourteenth Amendments to the United States Constitution and to the requirements of 18 U.S.C. §3182 and the Uniform Criminal Extradition Act.

STATEMENT OF CASE

Respondent, Isaac Foster, is charged in Indianapolis, Indiana, with the crime of robbery alleged to have been committed on December 7, 1962, in the City of Indianapolis, Marion County, Indiana. The basis for that charge is an affidavit made by one James V. Dabner, a police officer of the City of Indianapolis, on September 23, 1964, which affidavit purports to charge respondent with the crime of robbery. (R. 11)

The affidavit was prepared in the office of the prosecuting attorney in and for Marion County in Indianapolis, Indiana. (R. 42) Officer Dabner swore to the affidavit before one John Hesseldenz, a Justice of the Peace in and for Marion County, Indiana. Hesseldenz did not issue a warrant for arrest. (R. 42) Nor is there any indication in the affidavit itself or in any of the accompanying documents that Hesseldenz made a finding of probable cause against the respondent. (R. 11)

The affidavit was filed by Officer Dabner in the office of the Clerk of the Criminal Court in and for Marion County, Indiana. An arrest warrant was then issued out of the office of the clerk of said court under the name of Edwin McClure, the clerk. The warrant was signed by one Constance Schulmeyer, a deputy clerk of the court. (R. 6A, 42-43)

On September 23, 1964, the same day that Officer Dabner made his affidavit, the prosecuting attorney requested the Governor of Indiana to requisition Isaac Foster from the